STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. RITZER,

Plaintiff-Appellant/Cross-Appellee,

v

ST. JOSEPH COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 10, 2003

No. 243837
Saint Joseph Circuit Court
LC No. 02-000180-CZ

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Plaintiff David J. Ritzer appeals as of right from an order granting plaintiff's motion for summary disposition under MCR 2.116(C)(9) and (10), that compelled defendant St. Joseph County Sheriff's Department to disclose the items requested by plaintiff's Freedom of Information Act request, but denied plaintiff's request for punitive damages. Defendant cross-appeals from the same order pursuant to MCR 7.207. We affirm.

Plaintiff made a request under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, seeking eleven separate items from two different police files involving an ongoing case in which both plaintiff and defendant were involved. These items included police reports, audio/video tapes, photographs, and other documents relating to the underlying case, in which plaintiff was the defendant. He was initially charged with "Littering- Accident Debris on Highway," a criminal misdemeanor, for allegedly refusing to clean up hazardous material from the highway at defendant's request after he rendered assistance at the scene of an automobile accident.

Plaintiff made an oral request for the information on December 5, 2001, and sent a written request on January 2, 2002. Defendant did not respond in writing to plaintiff's requests until January 23, 2002, when it indicated that the request was denied "due to the open status of the case." The following day, on January 24, 2002, plaintiff's attorney made another written request under the FOIA for the same information, and defendant denied this request via a typewritten note on January 28, 2002. Plaintiff subsequently filed a complaint to compel disclosure of the public records pursuant to the FOIA. Defendant answered plaintiff's complaint, claiming as an affirmative defense that plaintiff was a defendant in a criminal misdemeanor case,

where he was being represented by the same attorney as in the suit to compel disclosure, and that the FOIA should not be used as a discovery tool.

Both parties moved for summary disposition, and by the time the trial court heard the opposing motions, the criminal misdemeanor charge in the underlying case had been lowered to a civil infraction charge. The trial court found that defendant did not meet its burden to prove that the requested information was exempt from disclosure under the FOIA, specifically MCL 15.243(1)(b)(i), and that there was no case law supporting defendant's argument that the Michigan Court Rule prohibiting discovery in a civil infraction case, MCR 2.302(3), surmounted plaintiff's right to obtain public records via the FOIA. Also, the trial court was not convinced from the circumstances of the case that plaintiff was entitled to punitive damages pursuant to MCL 15.240(7) because there was no showing that defendant's initial denial was done arbitrarily and capriciously. Subsequently, the prosecution voluntarily withdrew the civil infraction charge in the underlying case because defendant no longer wished to prosecute the case.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Questions of statutory interpretation are also reviewed de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The trial court's fact findings are reviewed for clear error and questions of law are reviewed de novo. *Detroit Free Press v City of Warren*, 250 Mich App 164, 166; 645 NW2d 71 (2002).

On appeal, plaintiff argues that the trial court erred in denying plaintiff's request for punitive damages because defendant arbitrarily and capriciously denied plaintiff's FOIA request under MCL 15.240(7). We disagree.

The public policy underlying the FOIA is to give all people access to information about governmental affairs and thus enable them to fully participate in the political process. MCL 15.231(2). The FOIA mandates full disclosure of all public records that are not specifically exempt under the act. MCL 15.233(1). MCL 15.240(7) provides:

> If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record.

Although the terms "arbitrarily" and "capriciously" are not defined in the statute, the terms have generally accepted meanings. *Laracey v Financial Institutions Bureau*, 163 Mich App 437, 440; 414 NW2d 909 (1987).

The United States Supreme Court has defined the terms as follows:

> Arbitrary is: "[W]ithout adequate determining principle . . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned."

> Capricious is: "[A]pt to change suddenly; freakish; whimsical; humorsome." [*Id*.; citing *Bundo v City of Walled Lake*, 395 Mich 679, 703 n 17; 238 NW2d 154 (1976), quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946).]

In the present case, defendant initially denied plaintiff's request because it believed that the underlying case was still open for investigation, and thus was exempt from disclosure under MCL 15.243(1)(b)(i), and that the FOIA should not be used as a discovery tool; discovery was controlled by the Michigan Court Rules. When the charge in the underlying case was changed from a misdemeanor to a civil infraction, defendant argued that MCR 2.302(A)(3), which specifically forbids discovery in a civil infraction case, usurped the FOIA. Even though unsuccessful and incorrect, we find that defendant's assertion of an exemption under the act was not "arbitrary and capricious" as those terms have been defined in relation to the FOIA. Defendant's denial was not arbitrary because it was not arrived at "without adequate determining principle" or "without consideration or adjustment with reference to principles, circumstances, or significance," nor was it capricious because it was not "apt to change suddenly" as the procedural history of this case demonstrates.

Plaintiff asserts that the denial of a request made under the FOIA must be made with specificity, rather than in a conclusory manner, citing *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 383-385; 581 NW2d 295 (1998). According to plaintiff, defendant arbitrarily and capriciously denied plaintiff's request in a conclusory manner when it stated without explanation, that the information requested was exempt as the subject of an open investigation under MCL 15.243(1)(b)(i), and that the Michigan Court Rules governing discovery surmounted the FOIA.

However, even though we agree that defendant's denial did not meet the burden for demonstrating an exemption, this does not mean that the denial was per se arbitrary and capricious. As this Court stated in *Tallman v Cheboygan Schools*, 183 Mich App 123, 126; 454 NW2d 171 (1990):

> Even if defendant's refusal to disclose or provide the requested materials was a statutory violation, it was not necessarily arbitrary or capricious if defendant's decision to act was based on consideration of principles or circumstances and was reasonable rather than "whimsical." [Citing *Laracey*, *supra* at 441.]

As discussed above, defendant's denial was supported by statutory and case law. Therefore, it was not automatically arbitrary or capricious despite its conclusory nature.

Plaintiff also asserts that defendant admitted to erasing and destroying two requested audio/video tapes, and that doing so is "arbitrary and capricious" as a matter of law, according to *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726; 415 NW2d 292 (1987). In *Walloon*, this Court found that the defendant's denial was arbitrary and capricious as a matter of law because the defendant informed the plaintiff that it possessed the requested document, but refused, without explanation, to disclose it, and then subsequently relinquished the only copy of the document to a third party before the trial. *Id.* at 734. The instant case is distinguishable from *Walloon*, because, here, defendant did offer a written explanation, although conclusory, asserting that all the requested material was exempt from disclosure. Defendant was unable to produce

two audio/video tapes pursuant to the trial court's order compelling disclosure only because the tapes had not been secured as evidence, and thus had been erased. Therefore, *Walloon* provides no support for plaintiff's argument in this case.

On cross-appeal, defendant presents three arguments as to why the trial court erred in compelling defendant to disclose the requested material under the FOIA and in awarding plaintiff attorney fees and costs. First, defendant argues that the information requested by plaintiff was exempt from disclosure under MCL 15.243(1)(b)(i), as an interference with law enforcement proceedings, because it involved an underlying criminal case that was still open for investigation. We disagree.

The question of whether defendant should be compelled to disclose the requested material is moot because, pursuant to the court's order, defendant disclosed all of the requested material that it possessed. When the disclosure that a suit seeks has already been made, the substance of the controversy disappears and becomes moot. *Densmore v Dep't of Corrections*, 203 Mich App 363, 366; 512 NW2d 72 (1994). However, as a result of the court's order plaintiff was awarded attorney fees and costs because he was the prevailing party. Thus, even though the issue of disclosure is moot, this Court is not precluded from considering plaintiff's request for attorney fees and costs under MCL 15.240(6). *Walloon*, *supra* at 733.

MCL 15.243(1)(b)(i) provides that a public body may exempt from disclosure as a public record investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would interfere with law enforcement proceedings. As this Court in *Herald Co*, *supra* at 383-384, observed, our Supreme Court in *Evening News Ass'n v Troy*, 417 Mich 481; 339 NW2d 421 (1983), outlined the procedure for evaluating a rejection of an FOIA request based on a claim of exemption under MCL 15.243(1)(b)(i). The first step is that the court "should receive a complete particularized justification as set forth in the six rules above (Part IC)." *Id*. at 516. Two of these six rules are:

> 5. Justification of exemption must be more than "conclusory", i.e., simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings.
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> 6. The mere showing of a direct relationship between records sought and an investigation is inadequate. [*Id.* at 503; citations omitted.]

In *Evening News*, the Court held that "the trial court erred in its generic determination that the defendants had met their statutory burden to sustain their claim of exemption where it was only alleged that disclosure would '[i]nterfere with law enforcement proceedings' or 'would indeed have a chilling effect on the investigation.'" *Id*. at 517. In this case, defendant's denial was similarly conclusory, explaining only that the requested information was exempt as part of an open police investigation. This repetition of the statutory language is insufficient to justify defendant's assertion of the exemption. Defendant offered no proof that the investigation of plaintiff's misdemeanor littering charge, or the civil infraction charge, was still open, nor did it explain how disclosure of the material would impede the open investigation. Furthermore, there was evidence that the criminal investigation was closed at the time defendant denied plaintiff's request. Therefore, the trial court correctly concluded that defendant did not meet the burden of

proving that the requested information was exempt under MCL 15.243(1)(b)(i), and properly awarded plaintiff attorney fees and costs.

Second, defendant argues that the trial court erred because MCR 2.302(A)(3)[1] (forbidding discovery in civil infraction cases) conflicts with the FOIA, and where the two are in conflict, the court rule should prevail over the statute. Again, we disagree.

This Court considered this issue in *Central Michigan Univ Supervisory-Technical Ass'n, MEA/NEA v Bd of Trustees of Central Michigan Univ*, 223 Mich App 727, 730; 567 NW2d 696 (1997), holding that the FOIA does not conflict with the court rules governing discovery, nor does it supplement or displace them.

> [W]e do not detect a conflict between the court rules and the FOIA. The FOIA is not a statutory rule of practice, but rather a mechanism for the public to gain access to information from public bodies regardless of whether there is a case, controversy, or pending litigation. The fact that discovery is available as a result of pending litigation between the parties does not exempt a public body from complying with the public records law. We refuse to read into the FOIA the restriction that, once litigation commences, a party forfeits the right available to all other members of the public and is confined to discovery available in accordance with court rule. [*Id*.]

After *Central Michigan Univ* was decided, MCL 15.243(l)(v)[2] went into effect which created an exemption from disclosure for materials requested under the FOIA where the requesting party and the public body are parties in a civil action. 1996 PA 553.[3] However, this amendment did not overrule *Central Michigan Univ*, *supra*, rather only added to the list of statutory exemptions provided by the FOIA. Thus, the public body asserting the exemption in MCL 15.243(l)(v) must prove that it is a party to a civil action with the requesting party. Otherwise, the Court's ruling in *Central Michigan Univ* is applicable, and the public body is afforded no exemption from disclosure based solely on the status of the parties as litigants.

In *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 364 n 18; 616 NW2d 677 (2000), our Supreme Court determined that the above exemption did not apply because the underlying case was an arbitration, and arbitration is not a "civil action" as defined in MCR 2.101. Similarly, here, that particular exemption is not applicable. Defendant concedes that plaintiff's civil infraction in the underlying case does not qualify as a "civil action" as

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[1] MCR 2.302(A)(3) provides, "Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions."

[2] MCL 15.243(l)(v) states, "A public body may exempt from disclosure as a public record … [r]ecords or information relating to a civil action in which the requesting party and the public body are parties."

[3] *Central Michigan Univ* was decided on May 30, 1997, while MCL 15.243(l)(v) went into effect ninety days after the 1996-1997 legislative session closed.

contemplated in MCR 2.101. In fact, if it did, there would be no conflict between MCR 2.302(A)(3) and the FOIA. Moreover, defendant's argument has no merit because the charge in the underlying case at the time plaintiff made his FOIA request was not a civil infraction, but rather a criminal misdemeanor. Accordingly, because the exemption in MCL 15.243(l)(v) does not apply to defendant and this Court's ruling in *Central Michigan Univ, supra*, remains applicable, we find that there is no conflict between the court rules and the FOIA in the present case.[4]

Finally, defendant argues that the trial court erred in ruling for plaintiff because the requested information was subject to an exemption by analogy under MCL 15.243(1)(v), even though the civil infraction in the present case does not fit the definition of a "civil action" under MCR 2.101. Defendant did not raise this issue before the trial court, therefore, the court did not consider it. Because defendant did not preserve this issue for appeal, we decline to address it. *Booth Newspapers, supra* at 234.

In conclusion, we hold that the trial court properly granted plaintiff's motion for summary disposition and awarded him attorney costs and fees. We also hold that the court did not err in denying plaintiff's request for punitive damages.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood

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[4] We note that *Central Michigan Univ, supra*, purported to overrule this Court's decision in *Jones v Wayne Co Prosecutor's Office*, 165 Mich App 62; 418 NW2d 667 (1987) (holding that the FOIA was not applicable to prisoners requesting information from their own criminal trials), to the extent the two cases conflicted; a ruling which this Court in *Seaton v Wayne Co Prosecutor's Office*, 225 Mich App 1; 570 NW2d 125 (1997), declined to recognize. However, this alleged conflict is irrelevant because plaintiff was not a prisoner at the time he made his FOIA request. In any event, the apparent conflict was resolved when the ruling in *Jones* was subsequently codified in MCL 15.232, which explicitly excepted prisoners out of the class of persons entitled to information under the FOIA. Hence, the rule in *Central Michigan Univ* is still good law to the extent it does not conflict with the statutory exceptions.